THE ORIGIN OF THE PECULIAR DUTIES OF PUBLIC SERVICE COMPANIES.[1]

PART II.

As a result of the great social and economic development which has taken place during the last century conditions have arisen which have been held increasingly to necessitate and to justify the grant to private individuals and enterprises of the exercise of powers or privileges not otherwise inhering in such individuals and enterprises. This has been an important factor in the growth of the law of Public Service Companies.

Such powers, privileges or "franchises" have been excellently defined by the Supreme Court of the United States as follows:[2]

"What is a franchise? Under the English law Blackstone defines it as 'a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject.' 2 Bl. Com. 37. Generalized and divested of the special form which it assumes under a monarchial government based on feudal traditions, a franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority."

The court continues:

"No private person can take another's property, even for a public use, without such authority; which is the same as to say that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise."

In these last sentences the court illustrates the two classes of franchises—the franchise, or power to do, and the franchise, or right to be. It is the former—the franchise or power to do—in

[1]The first part of this article appeared in the preceding number of the COLUMBIA LAW REVIEW, and is to be found at page 514 of the present volume.

[2]California *v.* Pacific Railroad (1888) 127 U. S. 1, 40.

which we are here interested, for, although the grant of the franchise or power to be a corporation may be expressly conditioned upon the performance of certain acts, yet at common law its grant does not carry with it such implied duties as does the grant of the franchise or power to do. This is natural, because, although it is necessary for the state to create a corporation, the mere franchise to be a corporation does not convey any powers reserved to the state, as does the franchise to do.

The governmental powers most frequently sought for the furtherance of private enterprises are the general power to take private property by eminent domain, the identical or very similar power to use property already dedicated to the public's use for streets and highways, and the privilege of the exclusive performance of some certain undertaking. Also closely allied to these powers is the grant of the use of state funds or credit to those engaged in certain enterprises.

A.

By force of the Fifth and Fourteenth Amendments to the Federal Constitution,[3] property cannot be taken under the power of eminent domain except for a public use.[4] This constitutional requirement has a dual significance: first, that the purpose for which it is desired to exercise the power must be of a character to be useful to the public; second, that the power must actually be exercised for the benefit of the public. The courts have found some difficulty in determining the scope of the first part of this requirement—namely, that the purpose for which it is desired to exercise the power of eminent domain must be of a character to be useful to the public—and the results have naturally been somewhat variant in different jurisdictions, because of the different views taken of the meaning of the word "use," and for historical and local reasons.[5] It would enlarge the scope of this article unduly to enter into a discussion of these difficulties, especially

[3]Although the Fourteenth Amendment is in itself effective to protect persons from abuse of the power of eminent domain by the states, there are also in most of the state constitutions provisions similar to those in the Fifth and Fourteenth Amendments to the Federal Constitution. See Nichols, Power of Eminent Domain, § 30.

[4]This interpretation of the Constitution is so well established that it hardly needs citation of authority, but see Missouri Pac. Ry. Co. *v.* Nebraska (1896) 164 U. S. 403; Madisonville Traction Co. *v.* St. Bernard Mining Co. (1905) 196 U. S. 239.

[5]See Nichols, Power of Eminent Domain, §§ 206, 207.

since, with regard to many undertakings, there is practical unanimity of opinion. There is no doubt, for instance, that the building of a steam railroad,[6] a street railway[7] and a navigation canal,[8] and the construction of reservoirs and waterworks to supply a community with water,[9] and the construction of a plant for the supply of gas[10] or electricity,[11] and the construction of telegraph[12] or telephone lines,[13] and the laying out or enlarging of cemeteries,[14] are purposes so useful to the public that it is proper to aid them by the grant of the power or franchise of eminent domain. And it has been held in Minnesota that the erection of a grain elevator is so useful to the public that it justifies the grant of the power of eminent domain for the purpose of obtaining a site for such elevator.[15]

The above undertakings are useful directly to the individual members of the communities where they are to be carried on, be the communities large or small. There are other undertakings whose purposes have, in some jurisdictions and to some extent, been held to justify the grant of the power of eminent domain, though their usefulness is not directly to the individual member of the community, but to the community as a whole, in that they tend to develop the state's natural resources. This class includes mining in certain states,[16] and draining large tracts of land.[17] Irrigation enterprises may fall either into this [18] or the previously described

[6]Secombe *v.* Milwaukee etc. R. R. Co. (1874) 23 Wall. 108; Louisville C. & C. R. R. Co. *v.* Chappell (S. C. 1838) Rice 383.

[7]Hartshorn *v.* Traction Co. (1904) 210 Ill. 609.

[8]Matter of Townsend (1868) 39 N. Y. 171; Chesapeake etc. Canal Co. *v.* Key (1829) Fed. Cas. No. 2649.

[9]Minnesota Canal etc. Co. *v.* Pratt (1907) 101 Minn. 197; Olmstead *v.* Proprietors of Morris Aqueduct (1885) 47 N. J. L. 311.

[10]Bloomfield Nat. Gas. L. Co. *v.* Calkins (1875) 62 N. Y. 386.

[11]Shasta Power Co. *v.* Walker (1906) 149 Fed. 568.

[12]State Trenton etc. Turnpike Co. *v.* Amer. etc. News Co. (1881) 43 N. J. L. 381.

[13]North Western Tel. Exch. Co. *v.* Chicago etc. R. R. Co. (1899) 76 Minn. 334.

[14]Evergreen Cemetery Assn. *v.* New Haven (1875) 43 Conn. 234; Farneman *v.* Mt. Pleasant Cemetery Assn. (1893) 135 Ind. 344.

[15]Stewart *v.* Great Northern Ry. Co. (1896) 65 Minn. 515.

[16]Highland Boy Gold Mfg. Co. *v.* Strickley (1906) 200 U. S. 527; Hand Gold Mfg. Co. *v.* Parker (1877) 59 Ga. 419. But several states are *contra*, Sutter County *v.* Nichols (1908) 152 Cal. 688; Sholl *v.* German Coal Co. (1887) 118 Ill. 427.

[17]Juvinall *v.* Jamesburg Drainage Dist. (1903) 204 Ill. 106; Mound City Land etc. Co. *v.* Miller (1902) 170 Mo. 240.

[18]Ellinghouse *v.* Taylor (1897) 19 Mont. 462; Clark *v.* Nash (1905) 198 U. S. 361.

class,[19] as may the furnishing of power for manufacturing and locomotion.[20] The flooding of lands for the purpose of obtaining the power for mills is also in many states held to be such a purpose as to justify the grant of the power of eminent domain for its furtherance.[21] The position taken by such jurisdictions can probably be justified only on historical grounds,[22] and several states have refused to hold such grounds to be sufficient.[23] The enumeration contained in this and the last paragraph could be considerably extended, but as it stands it is sufficient for present purposes.

Having seen by a brief survey of the authorities that the constitutional requirements, that property shall be taken only under the power of eminent domain for a public use, makes it necessary, in order to justify the grant of such power, to show that the purpose intended to be furthered by the grant, is one of *potential usefulness* to the public, we turn now to the consideration of this constitutional requirement as it affects the *actual use* of the power of eminent domain, when granted to a private person, partnership, association or corporation. And here also we shall consider the use which must be made of the privilege to occupy property already dedicated to the public's use for streets and highways, since the principles governing this privilege and the power of eminent domain are identical. In fact, frequently the exercise of the power of eminent domain is held to be necessary in order to give a right to the use of streets and highways,[24] and when this is not the case it is because it is held that an easement in, or the fee of the property making up the highway or street has been given for public use, and that

[19]Lake Koen Navigation etc. Co. *v.* Klein (1901) 63 Kan. 484; Paxton etc. Irrigation Canal Co. *v.* Farmers etc. Irrigation Co. (1895) 45 Neb. 884; Gutierries *v.* Albuquerque etc. Co. (1903) 188 U. S. 545.

[20]Jones *v.* North Ga. Elec. Co. (1906) 125 Ga. 618; Rockingham County L. & P. Co. *v.* Hobbs (1904) 72 N. H. 531; Walker *v.* Shasta Power Co. (1908) 160 Fed. 856. But some jurisdictions do not recognize this as a public use. Brown *v.* Gerald (1905) 100 Me. 351; State *v.* White River Power Co. (1905) 39 Wash. 648.

[21]Boston & R. Mill Corp. *v.* Newman (Mass. 1832) 12 Pick. 467; Amoskeag Mfg. Co. *v.* Head (1876) 56 N. H. 386.

[22]See Nichols, Power of Eminent Domain, §§ 242-245; and Cooley, Constitutional Limitations 771-773; and see Lowell *v.* Boston (1873) 111 Mass. 464-467 for an attempted explanation of the Mill Acts.

[23]Sadler *v.* Langham (1859) 34 Ala. 311; Ryerson *v.* Brown (1877) 35 Mich. 333.

[24]Bloomfield etc. Gas Light Co. *v.* Calkins (1875) 62 N. Y. 386; and see in connection with this note and the next note 15 Cyc. 676-683 and cases cited.

the purposes for which it is desired to use such highway or street constitute a public use.[25] As the Supreme Court of the United States has said, companies who do not enter streets and highways by eminent domain, enter them "in the exercise of the equivalent of the power of eminent domain."[26]

Mr. Wyman, in the article already referred to,[27] seems to assert that virtual monopoly makes a business a public calling, thereby imposing upon it the peculiar duties of impartial and reasonable service to all, and as a consequence of its being in this sense a public calling it becomes entitled to a grant of the powers of eminent domain, and to the use of streets and highways.[28] After a careful study of the cases, I am inclined to think that they more properly bear another interpretation. I think the cases will not show that a duty to serve all impartially and reasonably is a condition precedent to a right to receive the power of eminent domain or the power to use streets and highways, but, on the other hand, I think they will show that *as a result* of the grant of the powers above mentioned the grantee is bound to exercise these powers for the public. In those peculiar cases, which I mentioned above, where the power of eminent domain is granted, not because the purpose to be served is potentially useful to members of the public directly, but because it is potentially useful to members of the community in the aggregate, in that it develops the natural resources of the state, all that can be demanded of the user is that he use such power for the purposes of such development. But in the usual and orthodox case where the power of eminent domain or the power to use streets and highways is granted because the purpose to be served is potentially useful to members of the public directly, the requirement, that the grantee exercise these powers for the public, demands that he exercise them for the direct benefit of the members of the public individually.

In *Minnesota Canal and Power Co.* v. *Pratt*,[29] the company was seeking, under a legislative grant of the power of eminent domain, to condemn land for the construction of a canal which should serve the purposes of transportation, and of supplying water and generating electricity. The court said:

[25] People *v.* Kerr (1863) 27 N. Y. 188.

[26] Gibbs *v.* Baltimore Gas Co. (1888) 130 U. S. 396, 411.

[27] The Law of the Public Callings as a Solution of the Trust Problem, 17 Harv. L. Rev. 156-173, 217-247.

[28] *Ibid.* Part IV, particularly the first and last paragraphs of Part IV on pp. 217, 222.

[29] (1907) 101 Minn. 197, 212, 214.

"The petitioner is met at the threshold with the assertion that it is not a public-service corporation, and cannot, therefore, under any circumstances at present exercise the power of eminent domain. This contention seems to be the result of an inversion of ideas. It would be more nearly correct to say that the appellant is a public service corporation, because it has been granted the power of eminent domain in aid of the purpose for which it was incorporated. The power of eminent domain is not given to public-service corporations eo nomine. Certain corporations organized to serve the public are given the right to exercise this sovereign power as the agent of the State. * * *

"* * * It must serve the public on equal terms and for a reasonable compensation. * * * By accepting the franchise, the corporation engaged to use it in such a manner as will accomplish the objects for which the legislature granted the charter."

Since steam railroads and street railways are common carriers, they are bound as such to give to the travelling public reasonable service, as we have seen, and so we should not expect to find the grant to them of the power of eminent domain or of the power to use streets and highways playing a prominent part in the discussion of this duty, especially as their duty as carriers is so fully established that it hardly calls for discussion by the courts at the present day.[30] One of the earliest cases holding that the power of eminent domain might be granted to a steam railroad is *Louisville C. & C. R. R. Co.* v. *Chappell.*[31] It was taken for granted that there would be a "general right to use the road," although this was not specifically based upon the grant of the power of eminent domain, and the court may have intended to rest it upon the general duty of the railroad as a common carrier. But in *Lowell* v. *Boston*[32] the court said:

"There are indeed many cases in which the sovereign power of government is exercised to affect private rights of property in favor of private parties, either individuals or corporations. Most conspicuous among these are turnpikes and railroads; in whose favor this right of eminent domain is frequently exercised. * * * The franchises of the corporation [speaking of a carrier] are held charged with this duty and trust for the performance of the public service, for which they were granted."

In *Messenger* v. *Pennsylvania Railroad Co.*,[33] Bedle, *J.*, speaking for the Court of Errors and Appeals of New Jersey, said:

[30] In the analogous case of the turnpike it is held that the grant of the franchise to build and to take toll carries with it the duty to serve all. Commonwealth *v.* Wilkinson (Mass. 1834) 16 Pick. 175.

[31] (S. C. 1838) Rice 383.

[32] (1873) 111 Mass. 454, 463.

[33] (1874) 37 N. J. L. 531, 536-7.

"* * * I entirely agree with the Chief Justice that, in the grant of a franchise of building and using a public railway, that [*sic*] there is an implied condition that it is held as a *quasi* public trust, for the benefit of all the public, and that the company possessed of the grant must exercise a perfect impartiality to all who seek the benefit of the trust. * * * The bestowment of these franchises is justified only on the ground of the public good, and they must be held and enjoyed for that end. This public good is common, and unequal and unjust favors are entirely inconsistent with the common right. So far as their duty to serve the public is concerned, they are not only common carriers, but public agents, and in their very constitution and relation to the public, there is necessarily implied a duty on their part, and a right in the public to have fair treatment and immunity from unjust discrimination. The right of the public is equal in every citizen, and the trust must be performed so as to secure and protect it."

Other cases might be cited to the same effect.

The duty of telegraph and telephone companies to serve the public impartially and reasonably has sometimes been justified by classing them as special kinds of common carriers. In *State of Missouri* v. *Bell Telephone Co.*,[34] the court said:

"A telephonic system is simply a system for the transmission of intelligence and news. It is, perhaps, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all."

Similarly in a Vermont case[35] the court bases the duty of telegraph and telephone companies to serve all impartially upon analogy to common carriers, calling them "common carriers of speech for hire."[36] This is perhaps a justifiable extension of the law of common carriers by analogy, and we can hardly criticise the imposition of the duty to serve the public impartially and reasonably as a result of such analogy; but other jurisdictions have found a justification for the imposition of this duty, more reasonably, in the grant of the power of eminent domain or of the power to use streets and highways. In *State, Trenton, etc., Turnpike Co.* v. *Amer. etc. News Co.*,[37] the court of New Jersey found no statutory duty laid upon telegraph companies to serve all reasonably and impartially, but, after discussing certain statutes having to do with the rights of such companies, said:

[34](1885) 23 Fed. 539.

[35]Commercial Union Telegraph Co. *v.* N. Eng. Teleph. & Teleg. Co. (1888) 61 Vt. 241.

[36]See also State *v.* Nebraska Teleph. Co. (Neb. 1885) 22 N. W. 237 and Bell Teleph. Co. *v.* Commonwealth (Pa. 1886) 3 Atl. 825.

[37](1881) 43 N. J. L. 381, 385.

"These provisions of the law, in connection with the fact that the legislature has granted the right to take private property, clearly evince a legislative intent to lay such companies under an obligation to the public to permit the use of their lines by all persons, under reasonable regulations; and in accepting the benefits of this law, the recipient of them assumes the performance of this duty to the public."

The New Jersey court, in commenting on this case four years later,[38] said:

"The supplement of 1880 to the act concerning telegraph companies contains no express words imposing the duty to send messages for all who apply. In *Turnpike Company* v. *News Company,* 14 Vroom 381, the Supreme Court maintained the constitutionality of the law as constituting a public use, on the ground that there must be an implication that in granting the franchise, the legislature intended to charge companies with a duty to the public, and that in accepting the benefits of the law, the recipient of them assumes the performance of such public duty."

In *State* v. *Citizens Telephone Co.,*[39] the court, in answering the question, whether the defendant telephone company could be required by mandamus to furnish its instruments to the petitioner, said:

"To dispose of this third question, it will be necessary to recur somewhat to 'the circumstances of this case.' The undisputed facts are that the respondent, in the exercise of its franchise conferred by its charter, had established a telephone business in the city of Spartanburg, and had erected its poles and strung its wires in and along the streets of said city, and thus had become, at least, a *quasi* common carrier of news, and as such was under an obligation to serve all alike who applied to it with reasonable limitations, without any discrimination whatsoever. Where, therefore, the relator applied to the respondent to replace the telephone instruments in his grocery store and in his residence, from whence they had been removed by the defendant company but a few days before, the respondent was, in our opinion, bound to comply with such demand, under the obligations to the public which it had assumed."

To be sure the court here used the expression "*quasi* common carrier of news," but I take it that the court's meaning is that, with regard to the duty resulting from the grant of the franchises enjoyed, the telephone company resembled a common carrier.[40]

[38] Olmstead *v.* Proprietors of Morris Aqueduct (1885) 47 N. J. L. 311, 332-333.

[39] (1901) 61 S. C. 83, 97.

[40] See also Northwestern Telephone Exch. Co. *v.* Chicago etc. Ry. Co. (Minn. 1899) 79 N. W. 315, and Dunn *v.* Western Union Telegraph Co. (1907) 2 Ga. Ap. 845.

In *Western Union Telegraph Co.* v. *Call Publishing Co.*,[41] the court seems by its language to class telegraph companies as common carriers, but largely bases the duty of such companies to serve all customers impartially and reasonably upon the grant of special privileges or franchises. The court says:[42]

"No one can doubt the inherent justice of the rules thus laid down. Common carriers, whether engaged in interstate commerce or in that wholly within the State, are performing a public service. They are endowed by the State with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they render. As a consequence of this, all individuals have equal rights both in respect of service and charges."

There is a third class of telegraph and telephone company cases where the duty to serve all impartially is found expressly imposed by statutes.[43] If it is conceded that these companies are common carriers, or that the grant of the power of eminent domain, or of the power to use streets and highways carries with it the duty to serve all impartially and reasonably, then these statutory provisions may be viewed as mere codification of the common law. These provisions can, however, also be supported on the independent doctrines of the police power, which we shall discuss later.

One of the earliest of the "public utilities" to demand the grant to it of the power of eminent domain and the power to use streets and highways and to have its demand acceded to was the water company. In 1849 the Massachusetts court decided the often cited case of *Lumbard* v. *Stearns*.[44] It appears that the defendant Springfield Aqueduct Company had been granted power by its act of incorporation to take certain springs upon payment of compensation, and to dig up roads and ways, for the purpose of supplying Springfield with water. It was claimed that these grants were unconstitutional. The court said:

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[41](1901) 181 U. S. 92.

[42]*Ibid.* 99-100.

[43]City of St. Louis *v.* Bell Teleph. Co. (Mo. 1888) 10 S. W. 197; Hockett *v.* State (Ind. 1886) 5 N. E. 178; Central Union Tel. Co. *v.* Fehring (Ind. 1896) 45 N. E. 64; State *v.* Telephone Co. (1880) 36 Oh. St. 296; Chesapeake & P. Teleph. Co. *v.* B. & O. Teleg. Co. (Md. 1887) 7 Atl. 809; Bell Teleph. Co. *v.* Commonwealth (Pa. 1886) 3 Atl. 825; Amer. Rapid Teleg. Co. *v.* Conn. Teleph. Co. (1881) 49 Conn. 353; Young *v.* Batesville Teleph. Co. (1907) 81 Ark. 486.

[44](Mass. 1849) 4 Cush. 60, 62.

"But we can perceive no ground, on which to sustain the argument, that this act does not declare a public use. It is so expressed in its title, and in the first enacting clause, and the entire act is conformable to this view. The supplying of a large number of inhabitants with pure water is a public purpose. But it is urged, as an objection to the constitutionality of the act, that there is no express provision therein requiring the corporation to supply all families and persons who should apply for water, on reasonable terms; that they may act capriciously and oppressively; and that by furnishing some houses and lots, and refusing a supply to others, they may thus give a value to some lots, and deny it to others. This would be a plain abuse of their franchise. By accepting the act of incorporation, they undertake to do all the public duties required by it."

One of the most clearly stated, and most frequently cited cases in this connection is *Olmstead* v. *Proprietors of Morris Aqueduct.*[45] In determining that acts were constitutional which conferred the power of eminent domain on a water company, the court said:[46]

"In accepting such a charter the company impliedly engages on its part to use it in such manner as will accomplish the object for which the legislature designed it. It cannot refuse to perform the public duties thus cast upon it, without surrendering the franchise. When an individual or a corporation is guilty of a breach of public duty by misfeasance or nonfeasance, the law provides a remedy.

"The true criterion by which to judge of the character of the use is, whether the public may enjoy it of right, or by permission only. *Bonapart* v. *Camden and Amboy R. R. Co., Baldwin C. C.* 205.

"Assuming, as we must, that the legislature intended to exercise its lawful power, and that the company in invoking the benefit of the corporating act, took upon itself the correlative obligation to serve the public, it necessarily follows that the use is a public use."[47]

I cannot refrain from also quoting at some length from the case of *Haugen* v. *Albina L. & W. Co.*[48] The court there said in part:

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[45](1885) 47 N. J. L. 311.

[46]*Ibid.* 331 *et seq.*

[47]Then follows the comment on Trenton etc. Turnpike Co. *v.* Amer. etc. News Co., quoted above in connection with that case, and a comment on the case of Paterson Gas Light Co. *v.* Brady (N. J. 1858) 3 Dutcher 245, which will be referred to later in its proper place.

[48](1891) 21 Ore. 411, 415-420.

"From the statement of the case, as presented by the pleadings, the court below held that when the defendant entered upon and laid down its water-mains in the street, in pursuance of the privilege granted by the ordinance, it became bound to supply every abutter upon the street with water.

"The contention for the defendant is, that the ordinance does not impose the duty upon it to furnish water, but only if it shall furnish water, that the charge therefore shall not exceed a certain sum therein specified; that the grant is to lay pipes through the streets, for the purpose of conducting water through the city in the mode prescribed, and so as not to interfere with the construction of sewers; but that it contains no provision requiring it to supply the city or its inhabitants with water; hence the ordinance imposes no duty upon the company to furnish water to anyone.

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"* * * The effect to be given to the fact that the defendant company was incorporated under the law to furnish water to the city and its inhabitants, and the implied obligation which the defendant assumed by accepting the grant or franchise under the ordinance, is entirely overlooked.

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"As the defendant could not carry on the business of supplying water without the franchise, the city must have intended, in granting such franchise, to charge it with the performance of the duty it undertook for the public by the terms of its incorporation, and the defendant, in accepting the benefits of the grant, must have assumed the performance of such duty. In a word, the acceptance of a franchise, under such conditions, carries with it the corresponding duty of supplying the public without discrimination with the particular commodity, which the corporation was organized to supply."[49]

The same conclusion has been reached in numerous irrigation cases.[50] This would be true only in that class of irrigation cases where the grant of the power of eminent domain is based upon the direct usefulness of the undertaking of the grantee to the members of the public. When the power is granted because the grantee by its use will develop the natural resources of the

[49]Equally clear and striking language might be quoted from the decisions of many other courts, but it will only be possible here to refer the reader to some of the cases where such language is to be found. See Griffin *v.* Goldsboro Water Co. (N. C. 1898) 30 S. E. 319; McCrary *v.* Beaudry (1885) 67 Cal. 120; Minnesota Canal & Power Co. *v.* Pratt (1907) 101 Minn. 197; Rockingham County L. & P. Co. *v.* Hobbs (1904) 72 N. H. 531; Crumley *v.* Watauga Water Co. (Tenn. 1897) 41 S. W. 1058; American Water Works Co. *v.* State (Neb. 1895) 64 N. W. 711; State *v.* Butte Water Co. (Mont. 1896) 32 L. R. A. 697.

[50]Price *v.* Riverside L. & I. Co. (1880) 56 Cal. 431; Sammons *v.* Kearney P. & I. Co. (Neb. 1906) 110 N. W. 308.

state and so indirectly benefit the public, then, of course, as we have seen, all that we may demand of the grantee is that he shall use the power for that purpose.

Companies organized for supplying gas, either natural or manufactured, to residents of towns and cities, require the right to exercise the power of eminent domain or the power to use streets and highways. We have seen that their potential usefulness to the public is such as to justify the grant to them of this necessary power, and we come now to consider whether the grant of this power carries with it the obligation to serve all applicants impartially and reasonably. The authority to the effect that the grant of the power carries with it this correlative obligation is overwhelming. To be sure, in one of the earliest cases[51] in which this subject was discussed a different view was taken. The court said:

"That no such duty arises out of the mere facts, that the company made gas, laid pipes in the streets, and actually furnished it to many persons, may be safely assumed."

And again the court said:

"The Patterson Company is authorized to make and sell gas, which, in the absence of any indication to the contrary, implies that they may fix their own price, and choose their customers, like any other manufacturer."

This case, however, was repudiated in *Olmstead* v. *Proprietors of Morris Aqueduct*,[52] the court saying there:

"This decision fails, however, to give due effect to the purpose of the legislature in creating the company, and to the implied obligation assumed by the company in accepting the grant. If it were a grant for mere private uses, empowering the corporate body to withhold service at pleasure from all persons, the company would be without the right to occupy the public streets for the laying of its pipes, and, of course, the grant of eminent domain for such private purposes would be void."

On this subject the Supreme Court of the United States has expressed itself in the following terse language:[53]

"These gas companies entered the streets of Baltimore, under their charters, in the exercise of the equivalent of the power of eminent domain, and are to be held as having assumed an obligation to fulfill the public purposes to subserve which they were incorporated."

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[51]Paterson Gas Light Co. *v.* Brady (N. J. 1858) 3 Dutcher 245, 246, 248.
[52](1885) 47 N. J. L. 311.
[53]Gibbs *v.* Baltimore Gas Co. (1888) 130 U. S. 396, 411.

The Supreme Court of West Virginia has expressed itself on the same subject as follows:[54]

"Occupying the streets of Charleston, by permission of its council, first had, for the purpose of supplying to the inhabitants natural gas, the company is bound to furnish gas to every citizen applying therefor and willing to pay the price agreed upon between the company and the city. The occupancy of the streets by such company can only be for purposes in which the public is concerned, and the obligations thus assumed by the company, whether expressly incorporated in the franchise or not, will be enforced."

The subject of the duties of gas companies could hardly be better summed up than in the words of the court in *State* v. *Consumers Gas Trust Co.*[55]

"The appellee is a corporation authorized by the legislature to exercise the right of eminent domain (Acts 1889, p. 22) and licensed by the city of Indianapolis to lay pipes through its streets and alleys for the transportation and distribution of natural gas to its customers. These rights, which involve an element of sovereignty, and which can exist only by grant from the public, are rooted in the principle that their exercise will bestow a benefit upon that part of the public, in whose behalf the grant is made, and the benefit reserved by the citizens is the adequate consideration for the right and convenience surrendered by them. The grant thus resting upon a public and reciprocal relation, imposes upon the appellee the legal obligation to serve all members of the public contributing to its asserted right, impartially."[56]

The situation of electric lighting companies is so identical with that of gas companes that we should expect that the duties imposed on one would of necessity be imposed upon the other. Of this there seems to be no question,[57] and it is not, therefore, worth while to do more than refer in the footnote to some of the

[54]Charleston Nat. Gas Co. *v.* Lowe (1901) 52 W. Va. 662, 671.

[55](1901) 157 Ind. 345, 351.

[56]Other instructive cases on this subject of the duty of gas companies arising out of their exercise of the power of eminent domain, or the power to use streets and highways, are the following: Williams *v.* Mutual Gas Co. (1884) 52 Mich. 499; Portland Nat. Gas. & Oil Co. *v.* State (1893) 135 Ind. 54; Coy *v.* Indianapolis Gas Co. (Ind. 1897) 36 L. R. A. 535; Public Service Corporation *v.* American Lighting Co. (1904) 67 N. J. Eq. 122; Owensboro Gaslight Co. *v.* Hildebrand (Ky. 1897) 42 S. W. 351; Nairin *v.* Kentucky Heating Co. (Ky. 1900) 86 S. W. 676. See also 2 Beach, Private Corp. § 835.

[57]Jones *v.* North Georgia El. Co. (1906) 125 Ga. 618; Minnesota Canal Power Co. *v.* Pratt (1907) 101 Minn. 197; Rockingham County L. & P. Co. *v.* Hobbs (1904) 72 N. H. 53; Cincinnati H. & D. R. R. Co. *v.* Village of Bowling Green (1879) 57 Oh. St. 366.

numerous cases where the duty of electric lighting companies to serve all reasonably and impartially has been under discussion.[58]

In the light of the foregoing discussion and the authorities therein quoted and referred to, it would seem that it is not virtual monopoly which imposes the duty to serve all applicants reasonably and impartially, and that this duty in its turn justifies the grant of the power of eminent domain; but that the potential general usefulness of an undertaking to the members of a community justifies the grant of the power of eminent domain for the furtherance of this undertaking, and the acceptance of such a grant carries with it the duty to use such powers reasonably and impartially for the benefit of all applicants.

If the right to exercise the power of eminent domain rests upon the duty to serve the public it seems strange that that right has never been asserted by innkeepers, but if that right rests upon a peculiarly large potential usefulness to the members of a community in general the lack of the right in innkeepers is not surprising. On the other hand, the right of cemetery companies to exercise the power of eminent domain is not easily explained on the ground that a condition of virtual monopoly exists in the business of maintaining cemeteries, which puts upon the owners of cemeteries the duty to serve all applicants as a consequence of which cemetery companies have the right to exercise the power of eminent domain, for a condition of virtual monopoly does not seem to exist in the business of maintaining cemeteries, and the owners of cemeteries as a rule are not under a duty to serve all applicants. But cemeteries possess potential usefulness to the members of a community in general, which fully justifies the grant to them of the power of eminent domain, and as a result of such grant the grantees would be under a duty to serve all members of the community reasonably and impartially.

One further question with regard to eminent domain remains to be disposed of—namely, in order to justify the grant of the power of eminent domain, must it appear that it is the purpose of the would-be grantee to assume the duty to serve the public gener-

[58] In the Minnesota case of Stewart *v.* Great Northern Ry. Co. (1896) 65 Minn. 515, already referred to, where it was determined that the power of eminent domain might be granted to aid in obtaining a site for a grain elevator, it was contended that the statute authorized the use of the elevator for private purposes. The court held that if this were true the grant was unconstitutional because the grantee of the power of eminent domain must be under the duty to serve the public, but the court held that the statute did not in fact allow the use of the elevator for private purposes.

ally? Of course it should not appear affirmatively that the would-be grantee intends to use the grant for a private purpose, because the grant under such circumstances would be a grant for such private purpose, and so would be unconstitutional.[59] It has been held that in a condemnation proceeding it must affirmatively appear by the petitioner's pleadings that the would-be grantee intends to use the grant for the use of the public only.[60] Certainly the general view seems to be that such a purpose need not be contained in any public declaration, such as articles of incorporation, but may be shown by all the circumstances of the case,[61] and it would seem a proper presumption that a grant of such a power is constitutional, and (the purpose being such as to be potentially useful to the public) it would seem proper, nothing affirmatively appearing to the contrary, to presume that the grantee in obtaining the grant intends to serve the public generally, and to enforce upon him a duty to actually serve them as the consideration or price of such grant. This seems to be the view generally taken by the various courts as they have expressed themselves in the cases already discussed. In *Olmstead* v. *Proprietors of Morris Aqueduct*,[62] the court put it this way:

"Although the legislative act may contain no express provision imposing such duty, [to serve the public] the presumption is that the legislature intended to act within constitutional limits by creating a public franchise, and that the grant to the company was for the purpose of providing for the public necessity and convenience.

"The powers granted to the water company are unquestionably capable of being employed as a means of great public usefulness, and hence their creation was a legitimate act of legislation. An intention that they shall be used otherwise will not be imputed to the law-making power nor will the grantee be permitted to pervert them to uses for which they could not lawfully be bestowed."[63]

B.

The Fifth and Fourteenth Amendments to the Federal Constitution, and the numerous similar provisions in the state constitutions are of first importance in the discussion of taxation ques-

[59]Matter of Split Rock Cable Road (1891) 128 N. Y. 408; Berrian Springs Water P. Co. *v.* Berrian (1903) 133 Mich. 48; Harris *v.* Superior Court (1906) 42 Wash. 660.

[60]Evergreen Cemetery Assn. *v.* Beecher (1885) 53 Conn. 551.

[61]Walker *v.* Shasta Power Co. (1908) 160 Fed. 856; Bridal Veil Lumbering Co. *v.* Johnson (1896) 30 Ore. 205.

[62](1885) 47 N. J. L. 311, 331-332.

[63]See also Lewis, Eminent Domain (3rd ed.) § 313 and cases cited.

tions, requiring, as they do, that "no person shall be deprived of life, liberty or property without due process of law."[64] It is not due process of law to levy taxes except for public uses.[65] But this proposition is similar to that which was the starting point of the argument which I have just propounded, and which led to the conclusion that the grant of the power of eminent domain entails upon the grantee the duty to serve all applicants reasonably and impartially. If that argument is sound, it seems equally applicable to the cases of direct aid through taxation, or aid through the pledge of the public credit, which might necessitate taxation, and leads to the conclusion that potential usefulness of the undertaking to the members of the community is a necessary condition precedent to the grant of assistance to it through taxation, and that the grant of such aid entails a duty to serve all applicants reasonably and impartially.

The identity of principle underlying the grant of the power of eminent domain and of aid through taxation is thus expressed by the Massachusetts court:[66]

"The power of government * * * to affect the individual in his private rights of property, whether by exacting contributions to the general means, or by sequestration of specific property, is confined, by obvious implication as well as by express terms, to purposes and objects alone which the government was established to promote, to wit, public uses and the public service. This power, when exercised in one form is taxation; in the other, is designated as the right of eminent domain. The two are diverse in respect of the occasion and mode of exercise, but identical in their source, to wit, the necessities of organized society; and in the end by which alone the exercise of either can be justified, to wit, some public service or use."[67]

The condition precedent—namely, potential usefulness to members of the community—being the same in the case of the grant of the power of eminent domain and of the grant of aid through taxation, it would seem to follow that practically the same classes of undertakings would be capable constitutionally of receiving both grants. This is generally speaking true,[68] although it is said that

[64] Fifth Amendment to the Federal Constitution.

[65] Cooley, Taxation (3rd ed.) 181 *et seq.*

[66] Lowell *v.* Boston (1873) 111 Mass. 454, 462.

[67] In C. M. & Z. R. R. Co. *v.* Commissioners (1852) 1 Oh. St. 77 (a taxation case) it is said, at p. 96: "Where the right of eminent domain stops, there the right to incur any obligation for the public stops."

[68] See Cooley, Taxation (3rd ed.) Chap. IV; Wyman, Public Service Corporations § 64.

a more liberal construction of public purposes is allowed in questions of eminent domain than in questions of taxation.[68] At least, it is undoubted that the construction and maintenance of a railroad is such a public purpose as to justify aid through taxation.[70] This is also true of canals,[71] and irrigation[72] and drainage systems.[73]

Although it seems indubitable that the grant of aid through taxation imposes a duty to serve all applicants impartially and reasonably, this is a proposition which appears to have been very little discussed by the courts. There are several sufficient reasons for this paucity of authority. In the first place aid through taxation is granted with comparative infrequency to privately conducted enterprises. In the second place the recipients of such aid in the majority of cases are railroad companies, whose duty to serve all by force of the common law, is so thoroughly established, that it no longer calls for more than restatement by the courts. In the third place aid through taxation is probably never granted to a concern which does not also possess the right to exercise the power of eminent domain, which, as we have seen, is in itself a thoroughly established and sufficient basis for the duty to serve all. Finally, statutes granting aid through taxation frequently provide in express terms for service to all.[74]

Still we have some expressions of opinion by our courts on the point now under discussion. In *Fallbrook Irrigation Co.* v. *Bradley*,[75] in discussing a situation where financial aid had been extended to carry out an irrigation undertaking, the Supreme Court of the United States said:

"We think it clearly appears that all who by reason of their ownership of or connection with any portion of the lands would have occasion to use the water, would in truth have the opportunity to use it upon the same terms as all others similarly situated. In this way the use, so far as this point is concerned, is public

[69]Cooley, Taxation (3rd ed.) 192-197.

[70]Railroad Co. *v.* County of Otoe (1872) 16 Wall. 667; Prince *v.* Crocker (1896) 166 Mass. 347; City of Bridgeport *v.* Railroad Co. (1843) 15 Conn. 475; Gibson *v.* Mason (1869) 5 Nev. 283; Supervisors *v.* Wisconsin Cent. R. R. Co. (1877) 121 Mass. 460.

[71]Thomas *v.* Leland (N. Y. 1840) 24 Wend. 65.

[72]Fallbrook Irrigation Dist. *v.* Bradley (1896) 164 U. S. 112.

[73]Davidson *v.* New Orleans (1877) 96 U. S. 97.

[74]For examples of such statutes see Railroad *v.* Brannard (1853) 9 N. Y. 100; Fallbrook Irrigation District *v.* Bradley (1896) 164 U. S. 112; Irrigation Dist. *v.* Williams (1888) 76 Cal. 360.

[75](1896) 164 U. S. 112, 162-163.

because all persons have the right to use the water under the same circumstances. This is sufficient."

In other words, the duty of service set forth in the statute, required in exchange for state aid, was sufficient, because it was a duty to serve impartially all applicants properly situated, which is the duty required in return for state aid.

In *Price* v. *Crocker*[76] the Massachusetts court said:

"But railroads are always held to be built for public use, whether the right to take land, or the right to grant pecuniary aid to them, is considered. * * * The building of the subway for the carriage of such passengers as pay the regular fare is therefore for a public use; and it is within the constitutional power of the Legislature to order or sanction taxation for it."

Apparently it seemed so clear to this court that a railroad receiving the grant of the power of eminent domain or aid through taxation is "built for a public use" for "the carriage of such passengers as pay the regular fare" that the proposition needed no supporting argument.

In *Gibson* v. *Mason*,[77] a case determining that a railroad may be aided by taxation, the following language is quoted with approval by the court, as applicable to the question under discussion:

"* * * The objection that the corporation is under no legal obligation to transport produce or passengers upon the road, and at a reasonable expense, is unfounded in fact. The privilege of making a road and taking tolls thereon is a franchise, as much as the establishment of a ferry or a public wharf, and taking tolls for the use of the same. The public have an interest in the use of the railroad, and the owners may be prosecuted for the damages sustained, if they should refuse to transport an individual or his property without any reasonable excuse, upon being paid the usual rate of fare."

It seems clear from the court's use of this quotation that it felt it to be necessary for a concern, which receives aid through taxation, to serve all applicants reasonably and impartially, although the quotation in terms dealt with the grant of franchises.

C.

Of course no one can exercise a legally exclusive privilege at his own pleasure. On the other hand authorities make it equally clear that legally exclusive privileges may be granted in most of

[76] (1896) 166 Mass. 347, 361.

[77] (1869) 5 Nev. 283, 310.

our states.[78] Exclusive privilege, then, conforms to the definition of a franchise given by the Supreme Court of the United States, which, as we have seen, is that

"a franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security."[79]

But when may this franchise be granted? Judge Cooley says,[80]

"the grant of a monopoly in one of the ordinary and necessary occupations of life must be as clearly illegal in this country as in England,"

but he also says,[81]

"Where the grant is of a franchise which would not otherwise exist, no question can be made of the right of the State to make it exclusive, unless the constitution of the State forbids."[82]

In other words, the franchise of exclusive privilege may be granted in conjunction with the grant of some other franchise. It is difficult to conceive of its grant in conjunction with other franchises when those of eminent domain or use of public highways are not included, and if so granted, the grant can, as we have seen, only be to forward projects potentially useful to the public. Judge Cooley also recognizes that the grant of exclusive privilege may, under proper circumstances, be upheld as an exercise of the police power.[83] Of course a grant under the police power must be for a purpose useful to the public. That there must be a potential usefulness to the public in all cases of the grant of exclusive privilege seems clear, not only on the above grounds, but from the very nature of a franchise.[84] A franchise

[78]Cook, Corporations (6th ed.) §§ 922-932, and cases hereafter cited and discussed.

[79]California *v.* Pacific Railroad (1888) 127 U. S. 1, 40, already quoted at the beginning of this part of our discussion.

[80]Cooley, Constitutional Limitations (7th ed.) 401.

[81]*Ibid.*

[82]See Crescent City Gas Light Co. *v.* New Orleans Gas Light Co. (1875) 27 La. Ann. 138, 147, for a good judicial exposition of this view.

[83]Cooley, Constitutional Limitations (7th ed.) 403 n., citing Slaughter House Cases (1872) 16 Wall. 36.

[84]However, in California State Teleg. Co. *v.* Alta Teleg. Co. (1863) 22 Cal. 398, the court seems to put no such limitation on the power to grant exclusive privilege.

is a "right, privilege or power" reserved to the state in the interest of the public. Consequently the exercise of such privilege can be delegated only when the interest of the public will be subserved thereby. As the court of Wisconsin said, in *Shepard* v. *The Milwaukee Gas Light Co.*,[85] monopolies "are only to be tolerated on the occasion of a great public convenience or necessity."

But it seems that potential usefulness to the public is not merely a necessary condition precedent to the grant of exclusive privilege, but that such potential usefulness of a proposed undertaking is in most jurisdictions a sufficient ground for the grant of such privilege,[86] just as we found it to be a sufficient ground for the grant of the power of eminent domain or aid through taxation. To this effect is the language used in *Louisville Gas Co.* v. *Citizens Gas Co.*[87] by the Supreme Court of the United States, where that court said, in summarizing that part of the view of the state court with which they agreed,

"that * * * there was a public necessity for gas-lights upon its streets and in its public buildings, almost as urgent as the establishment of the streets themselves; that the services thus performed by the corporation were, in the judgment of the legislative department, an adequate consideration for the grant to it of exclusive privileges; and, consequently, that the grant was a contract, the rights of the parties under it to be determined by the rules applicable to contracts between individuals."

In other words, the benefit to the public justified the grant of the exclusive privilege, and this grant and the services to be rendered by the company constituted consideration on each side sufficient to make a binding contract.

Similarly in *Burlington and Henderson County Ferry Co.* v. *Davis*[88] the court said:

"Whatever objections there may be to the creation of a monopoly, it is considered as overcome in the matter of a ferry by the consideration of the public necessity or advantage."

It seems then that the legality of the grant of an exclusive privilege need not rest upon the police power nor need it rest

[85](1858) 6 Wis. 526, 534.

[86]There are some provisions in state constitutions against the grant of any exclusive privileges. See Stimson's American Statute Law § 17. And see Norwich Gas Light Co. *v.* The Norwich City Gas Co. (1856) 25 Conn. 20, where it was held that an exclusive privilege to gas companies to lay pipes, etc., is unconstitutional as being against public policy, and contrary to the theory of a free government.

[87](1885) 115 U. S. 683, 692.

[88](1878) 48 Ia. 133, 137.

upon the fact that the grantee is also the recipient of some other franchise, but that even if the grant of the exclusive privilege would deprive others of some legal right safeguarded by the Constitution such deprivation would be by due process of law if its object were the furtherance of an undertaking potentially useful to the public. To be sure it would seem that all undertakings which are so potentially useful to the public as to justify the grant to them of exclusive privileges, would be, because of such usefulness, entitled to a grant of the power of eminent domain, and in all probability would apply for and obtain such grant, so that the grants of exclusive privileges can probably be justified in practically every case on the ground that they are to be exercised in connection with other franchises which could not be exercised as of common right, as well as on the ground that they are to be exercised to further undertakings potentially useful to the general public.

Now it only remains to show that the grantees of the franchises of exclusive privilege are, by virtue of the grant, under a duty to serve the public impartially and on reasonable terms.

A case in point, which has gained much prominence in the literature of public service companies, is *Allnutt* v. *Inglis*.[89] It there appeared that the defendant had the legally exclusive privilege of warehousing certain goods at the port of London, and the question was whether defendant could make any charge it pleased, or whether it was bound to serve for reasonable compensation. The court said:

"* * * Here then the company's warehouses were invested with the monopoly of a public privilege, and therefore they must by law confine themselves to take reasonable rates for the use of them for that purpose. If the crown should hereafter think it advisable to extend the privilege more generally to other persons and places, so far as that the public will not be restrained from exercising a choice of warehouses for the purpose, the company may be enfranchised from the restriction which attaches upon a monopoly: but at present, while the public are so restricted to warehouse their goods with them for the purpose of bonding, they must submit to that restriction."

Of course the duty to serve all applicants is here necessarily to be implied from the recognition of the duty to serve for reasonable compensation.

The Supreme Court of the United States[90] has made itself per-

[89](1810) 12 East 527, 540.

[90]Louisville Gas Co. *v.* Citizens Gas Co. (1885) 115 U. S. 683.

fectly clear on this point by quoting with approval the following language:[91]

"* * * But in all such cases the person, whether natural or artificial, to whom the privilege is granted is bound, upon accepting it, to render to the public that service, the performance of which was the inducement to the grant; and it is because of such obligation to render service to the public that the legislature has power to make the grant. * * * Permission to keep a tavern or a ferry, to erect a toll-bridge over a stream where it is crossed by a public highway, to build a mill-dam across a navigible stream, and the like, are special privileges, and, being matters in which the public have an interest, may be granted by the legislature to individuals or corporations; but the grantee upon accepting the grant, at once becomes bound to render that service to secure which the grant was made; and such obligation, on the part of the grantee, is just as necessary to the validity of a legislative grant of an exclusive privilege as consideration, either good or valuable, is to the validity of an ordinary contract."

The Wisconsin court in a case from which I have already quoted,[92] says:

"Odious as were monopolies to the common law, they are still more repugnant to the genius and spirit of our republican institutions, and are only to be tolerated on the occasion of great public convenience or necessity; and they always imply a corresponding duty to the public to meet the convenience or necessity which tolerates their existence."

In *New Orleans Gas Light Co.* v. *Paulding*[93] the court said: "Having the sole and exclusive privilege of vending gas light in the cities of New Orleans and Lafayette, they are, we apprehend, bound under their charter, to supply gas to all persons who call for it, on their paying, or offering to pay for the same."

To the same effect is the language of the North Dakota court[94] in upholding an exclusive ferry franchise. The court said: "No oppression will result from the monopoly;" and the court went on to explain that such a franchise "is always granted in consideration of public services which the grantee is under legal obligations to render."

A very interesting case is that of *Weymonth* v. *Penobscot Log Driving Co.*[95] It appeared that the defendant had been granted

[91]From Gordon *v.* Winchester (Ky. 1826) 12 Bush. 110.

[92]Shepard *v.* Milwaukee Gas Light Co. (1858) 6 Wis. 526, 534-535.

[93](La. 1845) 12 Rob. 378, 380.

[94]In Paterson *v.* Wollmann (1896) 5 N. D. 608, 615.

[95](1880) 71 Me. 29.

an exclusive right to drive logs in the west branch of the Penobscot river. Defendant refused to drive plaintiff's logs, and plaintiff brought action to recover damages for this refusal. The court said:[96]

"In this case the charter conferred the privilege of driving, not a part, not such portion as the company may choose, but 'all' the logs to be driven. This right having been accepted by the company, it became a vested and also an exclusive right. * * * By its acceptance and exclusion of the owner from the privilege, in justice and in law it assumed an obligation corresponding to, and commensurate with its privilege. It accepted the right to drive *all* the logs, and that acceptance was an undertaking to drive them *all,* or to use reasonable skill and diligence to accomplish that object. This duty is not one imposed by the charter, certainly not by that alone, but is the result of the defendant's own act; it is its own undertaking; virtually a contract on its part, to accomplish that which it was authorized to do."

To sum up in a word, I think it appears from this part of my discussion that in the case of a great number of the so-called public service companies of the present day the peculiar duties resting upon them grow out of the exercise of public franchises or the receipt of financial aid from the state. The exercise of one of these franchises or the receipt of the aid from the public results necessarily in the assumption of the duties to the public to serve all proper applicants and to serve them reasonably and impartially, and the courts have with unanimity recognized this to be true.

(TO BE CONCLUDED.)[97]

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[96] *Ibid.* 39.

[97] In the next number of this Volume.